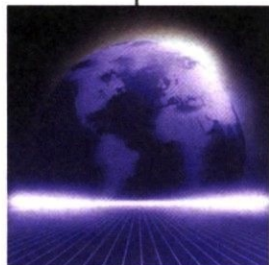


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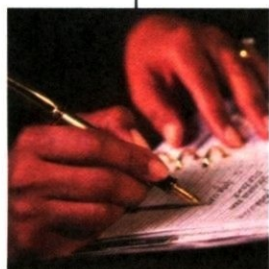


SEEING JUSTICE DONE: FROM SADDAM HUSSEIN IN IRAQ TO WHITE-COLLAR CRIME IN CHARLOTTE, N.C.

An Interview with Anne Tompkins by Thomas G. Walker

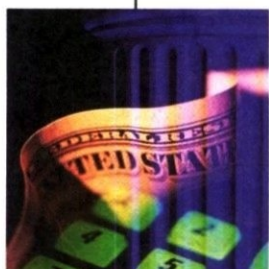
INVESTIGATION REPORTS: TO WRITE OR NOT TO WRITE

By Scott P. Hilsen



THE NAD: AN EFFICIENT AND COST-EFFECTIVE ALTERNATIVE TO TRADITIONAL FALSE ADVERTISING LITIGATION

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TITLE III OF THE AMERICANS WITH DISABILITIES ACT: THE LATEST TREND IN DISABILITY LITIGATION AND ITS EFFECT ON ONE OF OUR NATION'S MOST TREASURED AND HISTORIC LANDMARKS

By R. Steve Ensor and Ashley D. Brightwell

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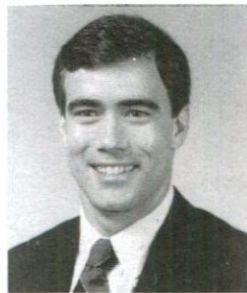
TITLE III OF THE AMERICANS WITH DISABILITIES ACT: THE LATEST TREND IN DISABILITY LITIGATION AND ITS EFFECT ON ONE OF OUR NATION'S MOST TREASURED AND HISTORIC LANDMARKS

*I*n December of 1995, two women – both confined to wheelchairs due to post-polio syndrome – contacted The Fox Theatre in Atlanta to complain about their seating accommodations during a recent performance. Those complaints marked the beginning of what would become a ten-year battle over how much a historic facility, built well before the passage of the Americans With Disabilities Act (ADA), must do to accommodate disabled individuals. From the retention of disability consultants and experts to confronting a complaint filed with the United States Department of Justice; from mediation of the complaints at issue to battling discovery disputes in district court – The Fox is just one of thousands of businesses facing the daunting task of defending the efforts it has made to accommodate the disabled community. As The Fox enters what should be the final chapter of this long battle, it awaits a decision from the Eleventh Circuit that will likely shape the future of disability litigation in this circuit.

Title III of the ADA

Title III is the provision of the ADA that regulates accessibility to places of public accommodation and commercial facilities. Pursuant to Title III, facilities constructed after the enactment of the ADA must conform to precise and exacting standards for accessible design, any deviation from which constitutes a barrier to access and evidences intentional discrimination against disabled persons.¹ Although not held to strict compliance with the standards applicable to new construction, even facilities like The Fox that were built prior to the passage of the ADA must identify barriers to access and remove those barriers where to do so would be considered “readily achievable” under the statute.²

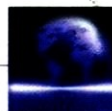
Although the ADA has been in existence since 1990, litigation under Title III has skyrocketed in recent years. States such as Florida,



*R. Steve Ensor, Partner
Labor & Employment Group
ensor@alston.com*



*Ashley D. Brightwell, Associate
Labor & Employment Group
abrightwell@alston.com*



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The Fox Theatre in Atlanta was originally planned as the site for a Shriners' temple. When financial troubles were encountered before the building was completed, a leasing deal was struck and The Fox opened in 1929 as a movie theater.

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California and Illinois in particular have seen tremendous growth in this type of litigation. These lawsuits are brought by individuals or, increasingly, advocacy groups purportedly seeking to protect their constituents from disability discrimination by alleging, for instance, that a particular business has an insufficient number of parking spaces in its parking lot, doors that are not wide enough to accommodate wheelchairs, or paper towel dispensers that are too high from the floor. While some such lawsuits come in the form of a suit filed by a single plaintiff against one particular facility, others come in the form of a class action lawsuit filed against numerous properties under the control of a single owner or lessor. Moreover, contrary to popular belief, virtually all businesses – regardless of size – are covered by Title III. Thus, businesses of all types are quickly recognizing that this type of litigation is just one more cost of doing business today.

The Case Against The Fox

A number of factors set the current Title III litigation against The Fox apart from the run-of-the-mill Title III case – most significantly, The Fox's status as a national historic landmark. Designed in the late 1920s, the historical import of The Fox was officially recognized for the first time in 1974 when it was listed in the National Register of Historic Places – the National Park Service's listing of the nation's most historic places. In 1976, the U.S. Department of the Interior designated The Fox a National Historic Landmark, the highest historical designation for private properties in the United States. Also, in 1991, due to its architectural and historical significance, The Fox became one of only nine buildings in Georgia to be designated a Landmark Museum Building by the State Historic Preservation Division of the Georgia Department of Natural Resources. Thus, unlike a typical theater that can fairly easily remove seats and level portions of the theater floor to create additional wheelchair sections or widen bathroom stalls to make them wheelchair accessible, doing so at The Fox would likely impact a number of features that contribute to its status as a protected historic landmark.

Despite the limitations placed upon The Fox due to its historic status, The Fox has undertaken numerous efforts over the years to accommodate its disabled patrons. A wheelchair-bound patron visiting The Fox today has a wide variety of accessible seating locations from which to choose, has an accessible box office from



which to purchase tickets, can visit wheelchair-accessible concession areas and restrooms, and can place calls on wheelchair-accessible telephones. In addition, The Fox has ensured that disabled patrons have a wide range of pricing options, including the option of paying the lowest ticket price for every show, and will likely encounter an “ambassador” – an usher specifically trained in how best to accommodate and assist The Fox’s disabled patrons.

The plaintiffs in the referenced litigation are dissatisfied with the modifications that The Fox has made and, regardless of its historic status, think that The Fox should be as accessible to patrons in wheelchairs as a theater constructed in 2006. Thus, The Fox has fought this litigation tooth and nail – defending the many modifications that it has made over the years while recognizing the compelling need to preserve the historic features that make the theater such a unique and valuable Atlanta treasure. Those efforts paid off and, in June 2005, the district court granted summary judgment in The Fox’s favor. Specifically, the district court held that, aside from the number and location of certain wheelchair locations, the plaintiffs failed to satisfy their burden of establishing that barriers to access actually exist at the theater. Moreover, the court opined that the plaintiffs failed to produce sufficient evidence to show that any alleged barriers should be removed pursuant to the standard applicable to facilities constructed prior to the enactment of the ADA.

A Matter of First Impression

An appeal to the Eleventh Circuit Court of Appeals followed. At issue on appeal is a matter of first impression in this circuit – namely, the amount and type of evidence a plaintiff must proffer to satisfy its burden of production in a Title III case. The plaintiffs/appellants in this matter urge that the burden placed upon them by the district court – to produce evidence of a specific design to remove the barriers alleged as well as the cost and effect such removal would have on the finances and operation of the facility – has the effect of rendering it “nearly impossible for disabled individuals to survive summary judgment.” The Fox takes the contrary position that lowering the burden as the plaintiffs suggest would completely do away with a plaintiff’s obligation to provide any meaningful evidence about the proposed method of barrier removal whatsoever. Rather, a plaintiff could meet her “burden” with nothing more than unsupported and

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The Fox is a mosque-like structure complete with minarets, onion domes, and an interior décor of an Arabian courtyard with a sky full of flickering stars and drifting clouds.

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*The theatre's enormous
Bedouin canopy overhang
is really a work of plaster
and steel rods, and serves
both as ornamentation
and as an acoustical
funnel to project sound
to the rear of the house.*

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conclusory assertions – regardless of the ultimate feasibility or cost of the measures proposed. Then, armed solely with conceptual ideas and summary assertions of affordability, a defendant would be left in the precarious position of producing “detailed evidence” relating to the feasibility of the proposal, the difficulties associated with its implementation, the associated costs, the effect that the proposal would have on the historic features of the facility, the economic effect that the proposal would have on the operation of the facility, and the like. The Fox, in fact, urges that a plaintiff’s burden of production, as advocated by the plaintiffs, is no burden at all.

A decision on this issue will be significant. As it currently stands, the law in this area is largely undeveloped and those on the receiving end of a Title III lawsuit are forced to navigate incredibly muddy and murky waters. Thus, at a minimum, a definitive ruling on the appropriate burden to be placed on a plaintiff to prove that barriers to access exist and should be removed will provide valuable guidance to those litigating under this statute. Moreover, as the issue involves the ease with which a plaintiff can prove its case, the decision will likely have a resounding effect on the number of such suits brought in this circuit.

Endnotes

¹ See *Access Now, Inc. v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1362 (S.D.Fla. 2001); 28 C.F.R. §§ 36.401, 36.402, 36.406(a), Part 36, Appendix A.

² See *South Florida Stadium Corp.*, 161 F. Supp. 2d at 1368.

OUR EXPERTISE ■

Alston & Bird’s Labor & Employment Group has expertise in all areas of employment litigation, and regularly defends corporate clients against claims of discrimination, retaliation, wage and hour violations, family and medical leave violations, and various state tort and contract claims. Our lawyers also regularly advise corporate clients on employment policies and practices, represent management in negotiations and disputes with labor unions, and assist employers with safety and health investigations, affirmative action planning and audits.

